

ADMINISTRATIVE APPEAL DECISION



NORTHLAND BUSINESS PARK, FILE NO. 20060030

KANSAS CITY DISTRICT

DATE: MAR 31 2006

Appeal Review Officer: Mores Bergman, U.S. Army Corps of Engineers (Corps),
Northwestern Division

Appellant: James Pellock, Northland Business Park, LLC

Receipt of Request for Appeal: October 27, 2005

Appeal Meeting and Site Visit Date: February 14, 2006

Background Information:

On September 29, 2005, Mr. Jon Miller of the Kansas City District (District) Missouri Regulatory Office met with Mr. Randy Proskocil, representing Northland Business Park, and conducted a jurisdictional determination (JD) on a parcel of land located in Section 19, Township 49 North, Range 12 West, in Boone County, Missouri. By letter of October 12, 2005, the Missouri Regulatory Office sent an approved JD for the site to Mr. Proskocil. On October 18, 2005, Mr. Miller revisited the site, at the request of Mr. Proskocil, to verify the extent of length of the jurisdictional channel identified in the October 12, 2005 approved JD. At the October 18, 2005 site visit, it was found that channel measured approximately 470 feet in length. It was also determined that the upper most end of the jurisdictional channel ended approximately 134 ft south of the northern border of the Pellock property. This information was provided to Mr. Proskocil on October 18, 2005.

On November 16, 2005, the Northwestern Division received an appeal of the approved JD from a Mr. James Pellock. By letter of December 5, 2005, the Appeal Review Officer requested additional information from Mr. Pellock regarding ownership of the property in question. On December 19, 2005, the review officer received a response from Mr. Pellock stating that he is the sole owner of the property in question, which he intends to develop under the name Northland Business Park. Processing of the appeal was conducted in accordance with the Administrative Appeal Regulation 33 C.F.R. Part 331. The Review Officer conducted an appeal meeting and site visit on February 14, 2006. The appellant's reasons for appeal are listed below.

Summary of Reasons for Appeal Submitted by Appellant:

Reason 1: The appellant contends that the water that flows across his property is not a stream since the water comes from a poorly planned 30-acre parking lot that empties onto his property at the property line, and the stream on his property starts in the middle of his property.

Reason 2: The appellant contends that if the site had been mowed prior to the inspection, the majority of the run-off channel (6" deep, 8" wide approx.) would have been smashed, rerouted and reseeded by mowing equipment, and thus the determination should be reconsidered.

Information Received during the Appeal Review and Its Disposition: The District provided the Review Officer and the appellant with a copy of the administrative record for subject JD. This information was considered in the appeal review. Information obtained during the appeal meeting and site visit conducted on February 14, 2006 was also considered in the appeal review to the extent that it provided clarification or explanation of the appeal request and the administrative record.

Summary of Decision: The appeal does not have merit. I find that the District has correctly applied the definitions contained in Regulation 33 C.F.R. Part 328 in determining that the waterway located on Mr. Pellock's property is a tributary to a known water of the United States and is therefore jurisdictional. In particular, I find the District has properly interpreted and applied the definition of "ordinary high water mark" as stated in 33 C.F.R. Part 328.3 in making their jurisdictional determination, and has provided adequate evidence in their administrative record to support the determination.

Appeal Decision Findings and Instructions for District Action:

Reason 1: The appellant contends that the water that flows across his property is not a stream since the water comes from a poorly planned 30 acre parking lot that empties onto his property at the property line, and the stream on his property starts in the middle of his property.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

Action: No action is required by the District regarding this reason for appeal.

Discussion: At the appeal meeting held on February 14, 2006, Mr. Pollock explained that before the parking lot was built on the property north of his property, that any rainwater runoff that flowed from the adjacent property onto his property would spread out and was not concentrated at any certain location as it is now. He said that there are now two outlet points from the parking lot to the north of his property that carry water on to his property, and that it is this concentration of water that has eroded the channel across his property. He further stated that he considers the flow across his property to be intermittent since water only flows when it rains. He therefore believes that the channel should not be considered a jurisdictional waterway. During the site visit, Mr. Pellock showed the Review Officer and District representatives the two locations where outlets from the adjacent parking lot would direct water onto his property. During the site

visit on February 14, 2006, it was noted that water was flowing in the channel in question, although no water was flowing from the parking lot north of Mr. Pellock's at that time. Mr. Litteken of the District indicated that it had not rained in the area for several days. Attached to the District's approved JD letter dated October 12, 2005, is found a USGS map which shows that the upper end of a waterway extends onto the Northern Business Park site. The USGS map further shows that this waterway is named Cow Creek Branch, and that the creek flows into another tributary downstream of the Pellock property. The administrative record also contains photographs taken by the District which shows the channel on the site in question, which starts near the north end of the property and flows to the south across the property. The photographs show evidence of an ordinary high water mark (OHWM) in the channel and also water in the channel at various locations. The photos also show that the channel continues southward off from the Pellock property and passes under a roadway, via two parallel culverts, and continues as a flowing creek downstream of the Pellock property. Further it is found that the jurisdictional determination form, which is attached to the approved JD dated October 12, 2005, indicates that the waterway in question is a tributary to other waters of the United States, and therefore is also a water of the United States. The JD documentation, maps and photographs found in the administrative record support the District's jurisdictional determination. It is therefore found that this reason for appeal does not have merit.

Reason 2: The appellant contends that if the site had been mowed prior to the inspection, the majority of the run-off channel (6" deep, 8" wide approx.) would have been smashed, rerouted and reseeded by mowing equipment, and thus the determination should be reconsidered.

Finding: This reason for appeal does not have merit for the reasons contained in the Discussion section below.

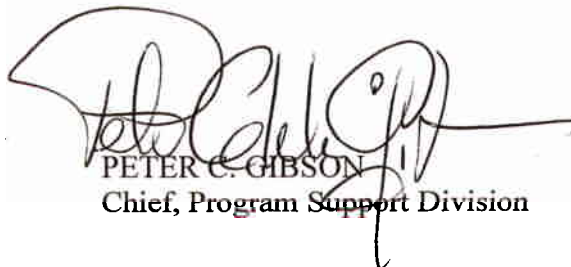
Action: No action is required by the District regarding this reason for appeal.

Discussion: As discussed under Reason 1 above, the evidence in the administrative record demonstrates that the channel that exists on the Pellock property shows evidence of an OHWM and meets the definition of a water of the United States. It is therefore found that this reason for appeal does not have merit.

Overall Conclusion:

After reviewing and evaluating information provided by the appellant, the District's Administrative Record, and information obtained during the appeal site visit, I conclude that this appeal does not have merit for the reasons stated above.

FOR THE COMMANDER:



PETER C. GIBSON
Chief, Program Support Division